

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

231849

**REASONABLENESS OF BNSF
RAILWAY COMPANY COAL
DUST MITIGATION TARIFF
PROVISIONS**

Docket No. FD 35557

ENTERED
Office of Proceedings

JAN 14 2012

Part of
Public Record

**COAL SHIPPERS' CONSENT MOTION
TO AMEND PROTECTIVE ORDER**

The Western Coal Traffic League ("WCTL"), American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively "Coal Shippers") hereby request that the Board amend the January 13, 2012 protective order in this proceeding¹ in order to resolve a discovery issue that has arisen between the parties since the December 20, 2011 date of the joint WCTL/BNSF request for a protective order.

Specifically, Coal Shippers request that the Board amend the protective order to add the now-standard language of STB protective orders regarding the production of documents subject to confidentiality restrictions in agreements with third parties. Counsel for Coal Shippers have discussed this issue with counsel for BNSF, and BNSF has stated that it does not oppose the relief requested herein. In addition, Counsel

¹ *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, Docket No. F.D. 35557 (STB served Jan. 13, 2012).

for Coal Shippers have conferred with counsel for all other parties in the case, and those parties likewise have confirmed that they do not oppose the relief requested herein.

In recent years, the Board has routinely issued protective orders that overrule, in advance, objections to the production of documents that parties raise on the basis of confidentiality restrictions under agreements with third parties. *See, e.g., Intermountain Power Agency v. Union Pac. R.R.*, STB Docket No. 42127, at 5 (STB served Jan. 27, 2011) (“*Intermountain Power Agency*”) (“Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production . . .”). In its decisions adopting such orders, the Board routinely comments upon the benefit of such language. *See id.* at 2 (“[I]n order to avoid the need for routine, unopposed motions to compel the disclosure of confidential contracts related to the dispute, the protective order specifically provides for the production of such contracts to enable a more efficient discovery process.”).

Coal Shippers respectfully request that the Board amend the protective order in this case to add the language set forth in Attachment A hereto. The text set forth therein is the same text approved by the Board in its protective order in *Intermountain Power Agency*. Issuance of this amendment would resolve the issue in dispute between the parties and would permit discovery to proceed in an expeditious and orderly fashion.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE
AMERICAN PUBLIC POWER ASSOCIATION
EDISON ELECTRIC INSTITUTE
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION

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Dated: February 14, 2012

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Their Counsel

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of February, 2012, I have caused copies of the foregoing to be served via email upon all parties of record in this case.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III

Requested Amendment to Protective Order (in Add/Delete Format)

7. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the shipper-specific data or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.